STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2008
v	No. 278826 Wayne Circuit Court
GEORGE WALTER TENNYSON, Defendant-Appellant.	LC No. 06-010137

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant was convicted of felon in possession of a firearm, MCL 750.224f, possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and contributing to the neglect or delinquency of a minor, MCL 750.145. Defendant was sentenced to one to five years' imprisonment for the felon in possession of a firearm conviction, five years' probation for the possession of less than 25 grams of heroin conviction, two years' imprisonment for the felony-firearm conviction, and 45 days, suspended sentence, for the contributing to the neglect or delinquency of a minor conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that there was insufficient evidence to find him guilty of possession of less than 25 grams of heroin because the prosecutor did not present expert testimony to confirm that the substance found was heroin. We disagree.

This Court reviews the record de novo when reviewing an argument that defendant was convicted with insufficient evidence. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). The evidence is viewed in the light most favorable to the prosecutor, and this Court determines whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To establish the elements of possession of less than 25 grams of heroin, the prosecutor must show the following: (1) defendant possessed a controlled substance, (2) the substance possessed was heroin, (3) defendant knew he was possessing heroin, and (4) the substance was in a mixture that weighed less than 25 grams. MCL 333.7403(2)(a)(v); see also *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of a crime may be established by drawing reasonable inferences from circumstantial evidence. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). Accordingly, "the element of criminal heroin possession, including the nature of the substance possessed, may be shown by circumstantial evidence . . . ." *People v Hill*, 86 Mich App 706, 711 n 3; 273 NW2d 532 (1978). It is for the trier of fact to determine what particular inferences can fairly be drawn from the evidence presented. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant was found in the bedroom of a residence where police executed a narcotics search warrant. Defendant was sitting on a bed. Under the bed, police found a substance in a small plastic bag on a plate. A razor blade and plastic spoon were also on that plate. Two loaded firearms, a digital scale, and papers addressed to defendant at that particular address were also found in the dresser in that room.

The police officers involved in the search testified at trial. One of the officers testified to having ten years of experience working with narcotics, conducting hundreds of heroin investigations per year, and being familiar with the packaging, texture, and color of heroin. Based on his experience, the officer concluded that the substance under the bed was heroin. An additional officer testified that she observed a preliminary test of the substance, which revealed that it contained heroin. Based on her experience, the razor blade and spoon were indicative of heroin packaging and distribution. Another officer testified that digital scales are frequently used to weigh narcotics, and the particular scale he found appeared to have residue from narcotics on it. He also explained that firearms are frequently used for protection in narcotics trades.

Defendant argues that the police officers did not qualify as experts and, therefore, their testimony was insufficient to establish that the substance contained heroin. However, nothing on the record establishes that the police officers were testifying as "experts." Although the police officers were not chemists, the officers were trained as narcotics agents, and have handled numerous cases involving heroin. And, while the testifying officers did not test the heroin themselves, their training and experience formulated the basis for their conclusions. *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). When viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence for a rational jury to find that the substance contained heroin.

Defendant next argues that there was insufficient evidence to find him guilty of possession of less than 25 grams of heroin, felon in possession of a firearm, and felony-firearm because the prosecutor did not establish that defendant "possessed" the substance or the firearms found. We disagree.

> A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. . . .
>
> The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person's presence,

> by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown. [*Wolfe*, *supra* at 519-520 (citations omitted).]

The prosecutor must also show that the defendant had dominion or control over the substance, with knowledge of its presence and character. *People v Meshell*, 265 Mich App 616, 621; 696 NW2d 754 (2005).

Here, police found a DTE electric bill addressed to defendant and dated less than a month before this arrest occurred. In addition, a Guaranteed Secured Life Plan that was found had been sent to the relevant address in defendant's name. The documents were found in the dresser, in the room where defendant was sitting. When viewing the evidence in the light most favorable to the prosecutor, a rational jury could conclude that defendant lived at that residence, and that the bedroom where he was sitting belonged to him. It would be reasonable for the jury to infer that defendant slid the plate, with the small plastic bag on it, under the bed at some point before the police officers made their way through the residence and into the back bedroom. Therefore, there was sufficient evidence for the jury to conclude, beyond a reasonable doubt, that defendant was in possession of the controlled substance found under his bed.

To establish the crime of felon in possession of a firearm, the prosecutor must show the following elements: (1) defendant possessed a firearm; (2) defendant had been convicted of a prior felony; and (3) less than five years had elapsed since defendant had been discharged from probation. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004). The word "possession" includes both actual and constructive possession of a firearm, and it can be established by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). In *Burgenmeyer*, our Supreme Court held that "a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession [of the firearm]." *Id*. at 438.

Here, the jury could have reasonably inferred that defendant had knowledge of the contents of his own bedroom, and that those contents were readily accessible by him. Again, the firearms were found in the same dresser where defendant's paperwork was found, and defendant was sitting in the room where they were found. Therefore, there was sufficient evidence to establish, beyond a reasonable doubt, that defendant possessed the firearms.

The elements of felony-firearm are: (1) defendant possessed a firearm, (2) during the commission or attempted commission of a felony. MCL 750.227b; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The second element of felony-firearm may be established by the felony of felon in possession of a firearm. *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). We have already concluded that defendant possessed the heroin and firearms at issue. Therefore, the elements of felony-firearm were satisfied.

Defendant next argues that there was insufficient evidence to find him guilty of contributing to the neglect or delinquency of a minor. We disagree.

MCL 750.145 provides:

> Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, . . . whether or not such a child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor. [The comma in the original is retained.]

Police found a ten-year-old boy, identified as defendant's son, sitting on a sofa in the front room of the residence. Although defendant argues that there is no evidence that the boy was abused, mistreated, or suffering in any way, the statute does not require the prosecutor to establish such factors. The intent of the statute is to prevent individuals from acting in a manner that contributes to the delinquency of minors, thereby preventing minors from coming within the jurisdiction of what is now the family division of the circuit courts. *People v Owens*, 13 Mich App 469, 476; 164 NW2d 712 (1968). It was aimed at preventing conduct "which would *tend to cause* delinquency and neglect as well as that conduct which obviously *has caused* delinquency and neglect." *Id*. at 479 (emphasis in original).

Here, defendant's actions, at the very least, placed his son directly in a home where illegal activity was occurring. It would be reasonable for the jury to infer that defendant knew his son was living in a house where heroin and loaded firearms were unlawfully kept. When considering the evidence in the light most favorable to the prosecutor, there was sufficient evidence for the jury to infer that defendant's illegal activities could have subjected his son to the jurisdiction of the courts. Therefore, there was sufficient evidence to convict defendant of contributing to the neglect or delinquency of a minor.

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. The determination of whether defendant has received ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court must review the trial court's findings of fact for clear error, while reviewing the court's constitutional determinations de novo. *Id*. Defendant did not file a motion for a new trial or evidentiary hearing and, therefore, our review of defendant's claims is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"Effective assistance of counsel is presumed, and defendant carries a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Generally, to overcome this presumption, a defendant must establish: 1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

This Court will not substitute its judgment for defense counsel's trial strategy and will not use the benefit of hindsight to determine counsel's effectiveness. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Certain decisions are presumed to be matters of trial strategy, such as the determination of which evidence to present and the decision whether to call or question certain witnesses. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

In addition, counsel's decision not to raise certain objections may be considered a matter of trial strategy. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

Defendant first asserts that counsel failed to object to the police officers' testimony that they believed the substance found was heroin. However, MRE 701 states that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In addition, police officers may testify regarding their opinions on topics with which they have personal knowledge of or experience. *Oliver, supra* at 50.

The officers' testimony was based on their personal involvement with the substance and their experience dealing with narcotics. Nothing in the record reveals that their testimony was presented as "expert" testimony, or that they claimed to have chemically tested the substance themselves. Therefore, we cannot conclude that the officers' opinions or inferences were not rationally based on their perceptions. Furthermore, their testimony was likely helpful to the jury in determining a fact at issue – whether the substance was heroin.

Counsel's failure to raise "futile" objections does not constitute ineffective assistance of counsel. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Because the officers' testimony was properly based on their personal knowledge and experience and did not exceed the bounds of MRE 701, counsel's failure to object to their testimony cannot be deemed as ineffective assistance of counsel.

Defendant next asserts that counsel failed to call exculpatory witnesses on his behalf. Defendant cites *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996), to support this argument. In J*ohnson*, the potential witnesses at issue were eyewitnesses, who signed sworn affidavits stating that they personally observed the incident and the defendant did not even fire a gun. *Id*. at 118. Defendant also cites *People v Bass*, 247 Mich App 385; 636 NW2d 781 (2001), where a codefendant could have testified that he did not even know who the defendant was and had never engaged in drug-sale activities with him. *Id*. at 391. That testimony would have directly negated the defendant's involvement in the drug sale a issue. *Id*. In contrast to those cases, defendant does not specify which witnesses he believes counsel should have called and what those witnesses would have testified to. Therefore, we cannot conclude that counsel was deficient for this reason.

Finally, defendant asserts that counsel failed to prepare an adequate defense to the allegations that the home searched was defendant's residence and that defendant possessed the substance and firearms found. The record reveals that counsel inquired into why the officers did not determine if someone other than defendant resided at the home searched. Counsel clarified, upon cross-examination of the officers, that they did not know to whom the residence was actually leased, did not know who owned the substance or the firearms found, and never saw defendant in possession of those items.

Defendant presents nothing on appeal to show that the defense provided by counsel fell below the objective standard of reasonableness. Instead, the record indicates that counsel acted as a rigorous advocate for defendant, repeatedly attempting to contradict evidence linking defendant to the residence, the substance, and the firearms. When claiming ineffective assistance

of counsel due to counsel's failure to prepare for trial, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The facts and evidence presented make it difficult for defendant to establish that the outcome of his case would have been different had counsel somehow prepared his defense differently.

We conclude that defendant has not overcome the presumption that counsel's assistance was effective.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray